

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

VANESSA BROWN-CUMMINGS,
Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES,
Agency.

DOCKET NUMBER
PH03538710184-1

DATE: FEB 09 1989

Kenneth A. Greene, Philadelphia, Pennsylvania, for the
appellant.

Thomas K. Muldowney, Philadelphia, Pennsylvania, for
the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

The agency has petitioned for review, and the appellant has cross-petitioned for review, of the initial decision issued on May 9, 1988, that ordered the agency to restore the appellant retroactively to her former position. For the reasons discussed below, we GRANT the agency's petition under 5 U.S.C. § 7701(e), DENY the appellant's cross-petition because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, REVERSE the initial

decision, and DISMISS the appellant's appeal for lack of jurisdiction.

BACKGROUND

In an opinion and order issued December 30, 1987, the Board remanded this case to the Philadelphia Regional Office for a hearing on the appellant's contention that she was denied restoration rights by the agency. The Board found that the appellant had made a non-frivolous allegation that her termination from the GS-3 position of File Clerk resulted from or was substantially related to a compensable injury.¹ In doing so, the Board noted that the agency indicated in its September 12, 1984 notice to the appellant, that it separated her, at least in part, for performance reasons which may have resulted from her physical inability to perform, and that she believed that her problems stemmed from a compensable injury. See *Brown-Cummings v. Department of Health and Human Services*, 36 M.S.P.R. 94, 100-01 (1987).

The administrative judge found that the appellant was entitled to immediate restoration to her position as of December 29, 1984, the date she was determined to be fully recovered from her compensable injury by the Office of Workers' Compensation Programs. He reached this conclusion after finding that the appellant's termination was

¹ The Board's decision incorrectly states that the appellant was separated on September 19, 1984. The appellant's separation was effective September 14, 1984. See Initial Appeal File, Agency File, Tab 1.

substantially related to her compensable injury. He further found that her request for restoration should not be denied as untimely filed because she exercised due diligence in seeking out her rights and in requesting restoration.

ANALYSIS

In its petition for review, the agency contends that the administrative judge erred in finding that the appellant's termination was substantially related to her compensable injury. We agree.²

The administrative judge's findings on this issue are set forth in the initial decision as follows:

There is abundant evidence that appellant's poor work performance was related to her inability to work efficiently because of her back injury. Further, her alleged failure to follow her supervisor's instructions regarding submission of medical forms is also related to her back injury. Both of these reasons for her termination were related to her compensable injury, and establish the necessary causation to conclude that her termination during probation was substantially related to her compensable injury. See *Miner (sic) v. U.S. Postal Service*, 31 M.S.P.R. 369

² Because we find that the appellant was not entitled to any restoration rights, we find it unnecessary to address her cross-petition for review, which argues that the administrative judge erred by failing to decide whether she was denied restoration as a partially recovered employee. This assertion does not provide a basis for Board review under 5 C.F.R. § 1201.115 because it does not establish that the initial decision is based on an erroneous interpretation of statute or regulation. We also find it unnecessary to decide whether the administrative judge erred in finding that the appellant's request for restoration should not be denied as untimely.

(1986).³ Accordingly, appellant had restoration rights to her position subsequent to her recovery from that injury.

Initial Decision at 4.

The only evidence the administrative judge cited to support this conclusion, however, was documents reportedly showing that the appellant's performance steadily deteriorated from the time of her back injury in April, 1984, until her removal in September, 1984. Although in one of these documents, a July 13, 1984 Progress Interview, the appellant's supervisor stated that she had noticed an improvement in one critical element of the appellant's position until the time that the appellant developed her back problem, she concluded that the appellant's performance in drop filing was below average from February, 1984, through May, 1984. See Remand File, Tab 12-6. Thus, the evidence cited indicates that the appellant had performance problems before she suffered her compensable injury.

Furthermore, even if the evidence established that the appellant's back problems caused her performance deficiencies, it would not necessarily prove that she was removed because of a compensable injury. The agency asserted that she was removed for failing to submit the

³ The U.S. Court of Appeals for the Federal Circuit affirmed the Board's decision in *Minor v. Merit Systems Protection Board*, 819 F.2d 280 (Fed.Cir. 1987). In a later opinion, the court specifically noted that the correct spelling of the appellant's name is "Minor". See *Roche v. United States Postal Service*, 828 F.2d 1555, 1557 n.7 (Fed.Cir. 1987).

requested medical documentation. Concerning this point, the administrative judge stated that the appellant's "alleged failure to follow her supervisor's instructions regarding submission of medical forms is also related to her back injury." The appellant's failure to submit the forms was related to her injury only to the extent that there would be no need for medical documentation absent the injury. A simple connection between the compensable injury and the termination, however, does not establish that the two are substantially related.⁴

More important, the administrative judge did not address the evidence presented by the agency, in the form of consistent testimony by Catherine Savin, Employee Relations Manager, that the appellant was separated because she refused to provide the requested medical documents. See Transcript (Tr.) at 72, 73, 79, and 87. Indeed, Ms. Savin testified: "It is my contention that the Appellant's separation was due to her failure to provide requested documentation, period." Tr. at 79. Ms. Savin supported her statements by explaining that the medical documentation the appellant had provided was insufficient, so she provided her with a form, containing specific questions, for her doctor to answer. Ms. Savin stated that the information provided

⁴ We note that the U.S. Court of Appeals for the Federal Circuit has not decided whether the Board's addition of the "substantially related" criterion is a proper interpretation of the statutory and regulatory requirement that an employee's termination must have resulted from a compensable injury. See *Roche*, 828 F.2d at 1557 n.6; *Minor*, 819 F.2d at 282 n.3.

by the doctor was the same information he had already provided, and clearly did not respond to the questions. See Tr. at 88-94.

The appellant bears the burden of proving jurisdiction in an appeal of restoration rights. See *Cox v. Merit Systems Protection Board*, 817 F.2d 100, 101 (Fed.Cir. 1987). At the hearing, however, the appellant simply agreed with her representative that a September 4, 1984 memorandum she received from her supervisor and a conversation she had with her supervisor thereafter caused her to believe that her separation resulted from or was related to her compensable injury. Tr. at 55. Although the memorandum notified the appellant that the agency would proceed with the information, presumably concerning the appellant's medical condition, that it already had, it related that it would do so because of the appellant's failure to comply with the agency's repeated requests for medical documentation. See Remand File, Tab 11, Agency Exhibit #5. The appellant did not explain why her conversation with her supervisor led her to believe that she was being separated because of her compensable injury.

We find that the appellant's testimony is insufficient to sustain her burden of proof, in light of the specific testimony from the agency that the appellant's separation was based on her refusal to submit the proper medical information. Moreover, we find that the references to poor performance in the agency documents, especially when the

evidence does not clearly indicate that the appellant's performance problems resulted from her compensable injury, do not establish that her termination was substantially related to a compensable injury.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.


Robert E. Taylor
Clerk of the Board